TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~1299~~ 807

JOHN C. PHELPS, B. H. THROOP, AND MARY T. PHELPS, PLAINTIFFS IN ERROR,

vs.

GEORGE R. OAKS, MARIA ZEIDLER, AND JOHN ZEIDLER, HER HUSBAND.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED DECEMBER 6, 1884.

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1 UNITED STATES OF AMERICA, *set:*

The President of the United States to the judges of the circuit court of the United States for the western division of the western district of Missouri, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court, before you, between John C. Phelps, B. H. Throop, and Mary T. Phelps and George R. Oaks, Maria Zeidler, and John Zeidler (her husband), a manifest error hath happened, to the great damage of the said John C. Phelps, B. H. Throop, and Mary T. Phelps, as by their complaint appears:

We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, D. C., on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court.

Issued at office in Kansas City, this 20th day of November, A. D. 1884.

[SEAL.] H. C. GEISBERG, *Clerk*,
By WARREN WATSON, *D. C.*

Allowed by—
A. KREKEL, *Judge*.

1½ WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *set:*

I do hereby return due and perfect obedience to the within writ, and do herewith, under the seal of said circuit court, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same.

Witness my hand as clerk, and the seal of said court. Issued at office in Kansas City, this twenty-sixth day of November, A. D. 1884.

H. C. GEISBERG, *Clerk*,
By WARREN WATSON, *Deputy Clerk.*

[Endorsed:] United States circuit court, western district of Missouri, western division. Writ of error.

2 UNITED STATES OF AMERICA, *sct:*

To George R. Oaks, Maria Zeidler, and John Zeidler (her husband), Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C., on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western division of the western district of Missouri, wherein John C. Phelps, B. H. Throop, and Mary T. Phelps are plaintiffs in error and yor are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arnold Krekel, judge of the circuit court of the United States for the western division of the western district of Missouri, this 20th day of November, in the year of our Lord one thousand eight hundred and eighty-four.

A. KREKEL, *Judge.*

2½ UNITED STATES OF AMERICA, } *ss:*
Western District of Missouri, }

We hereby acknowledge due service of the within citation, this twenty-fourth day of November, A. D. 1884.

RAMEY & BROWN,
Attorneys for Defendant in Error.

[Endorsed:] United States circuit court, western district of Missouri, western division. John C. Phelps *et al.*, P. E., *vs.* George R. Oaks *et al.* Citation.

3 UNITED STATES OF AMERICA, *sct:*

JOHN C. PHELPS *et al.*, Plaintiffs in Error,
against
GEORGE R. OAKS *et al.*, Defendants in Error,

Pleas and proceedings had before the circuit court of the United States for the western division of the western district of Missouri, in the case of John C. Phelps, B. H. Throop, and Mary T. Phelps, plaintiffs, against George R. Oaks, Maria Zeidler, and John Zeidler, defendants. At law.

Be it remembered, that heretofore, to wit, at a regular May term of the circuit court of the United States aforesaid, at Kansas City, in said western division of the western district of Missouri, to wit, on Monday, May 19th, A. D. 1884, it being the first day of said term, the following entry was made upon the record of said court, to wit:

JOHN C. PHELPS *et al against* GEORGE R. OAKS.

This day come plaintiffs, by their attorneys, and present to the court a transcript of record from the circuit court of De Kalb county,

and moves the court for leave to file and docket the same, which is accordingly granted, and said cause is docketed. Thereupon the plaintiffs enter appearance.

The said transcript of record is in words and figures as follows, to wit:

4 Be it remembered that at the April term, A. D. 1883, of the circuit court of the county of De Kalb, in the State of Missouri, and on the fourth day of April, the following proceedings were had and entered of record, to wit:

JOHN C. PHELPS, B. H. THROOP, and MARY T. PHELPS, Plaintiffs,

against

GEORGE R. OAKS, Defendant.

Come now the plaintiffs, by their attorney, and file their petition in this cause. And it is ordered by the court that a summons issue herein for defendant, George R. Oaks, directed to the sheriff of De Kalb county, Missouri, made returnable to the next term of this court.

Which said petition is in the words and figures following, to wit:

In the Circuit Court of De Kalb County, Missouri. April Term, 1883.

JOHN C. PHELPS, B. H. THROOP, and MARY T. PHELPS, and ISAAC J. PAST, Plaintiffs,

against

GEORGE R. OAKS, Defendant.

Plaintiffs state that on the 28th day of November, 1881, they were entitled to the possession of, and are still so entitled, and own the northwest quarter of section four (4) of township fifty-seven (57), range thirty-two (32), situate in De Kalb county, Missouri,
5 and being so entitled to the possession thereof, that the defendant afterwards, to wit, on the 28th day of November, 1881, entered into said premises, and unlawfully withholds from plaintiffs the possession thereof, to their damage in the sum of five thousand dollars.

That the monthly value of the rents and profits of said premises is fifty dollars per month.

Wherefore plaintiffs pray judgment for recovery of the said premises, and five thousand dollars damages for the unlawful withholding of same from plaintiffs, and fifty dollars per month for rents and profits from the rendition of judgment until the possession of the premises be delivered to plaintiffs, and for other proper relief.

WHITE, STRONG & MOSMAN, AND THOMAS,
Pl'ff's Att'ys.

To which said petition is attached a summons in words and figures following, to wit:

Summons.

STATE OF MISSOURI, } ss:
County of De Kalb, }

In the Circuit Court.

The State of Missouri to the sheriff of De Kalb county, Greeting:

We command you to summon George R. Oaks, if he be found in your county, to appear before our circuit court, to be holden within and for the county of De Kalb, at the court-house in the town of Maysville, in said county, on the first day of the next term thereof, to be begun and held on the first Monday in October next, A. D. 1883, then and there before the judge of our said court to answer the petition of John C. Phelps, B. H. Throop, and Mary T. Phelps, (a certified copy of which said petition is hereto annexed),
6 and have you then and there this writ, with the return of your action thereupon.

Witness my hand as clerk of our said court, and the seal thereof. Done at office in Maysville, in the county aforesaid, on the 4th day of April, A. D. 1883.

[SEAL.] G. Y. CRENSHAW, *Clerk.*

Upon which summons is the return of sheriff in words and figures following:

Sheriff's Return.

Executed the within writ in the county of De Kalb, on the 9th day of April, A. D. 1883, by delivering a copy of the same, together with a copy of the petition hereto attached, to George R. Oaks, the defendant.

E. J. SMITH,
Sheriff De Kalb County, Mo.,
By SEXTUS C. LYNCH, *Deputy.*

And afterward, to wit, at the April term, 1884, of the circuit court of said De Kalb county, and on the 7th day of April, among the proceedings of said court appears the following, to wit:

JOHN C. PHELPS, B. H. THROOP, and MARY T. PHELPS, Plaintiffs
against
GEORGE R. OAKS, Defendant.

Now at this time, on motion of the plaintiffs, it is ordered by the court that Isaac J. Past be made a party plaintiff in this cause.

7 JOHN C. PHELPS, B. H. THROOP, and MARY T. PHELPS, and ISAAC J. PAST, Plaintiffs,
against
GEORGE R. OAKS, Defendant.

Come now the plaintiffs herein, by their attorney, and file their petition, bond, and affidavit for a removal of this cause to the United States circuit court in and for the western division of the western district of Missouri, at Kansas City, Missouri.

Which said petition is in the words and figures following, to wit:

Petition for Removal to the Circuit Court of the United States, Western Division of Western District of Missouri.

In the Circuit Court of De Kalb County, State of Missouri.

JOHN C. PHELPS, B. H. THROOP, MARY T. PHELPS, and ISAAC J. PAST, Plaintiffs,
against
GEORGE R. OAKS, Defendant.

To said circuit court:

Your petitioners respectfully show to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of differ-
8 ent States, and the petitioners were at the time of the commencement of this suit, and still are, citizens of the State of Pennsylvania, and that defendant was then, and still is, a citizen of the State of Missouri.

And your petitioners offer herewith a bond, with good and sufficient surety, for their entering in said circuit court of the United States for the western district of Missouri, western division, on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And they pray this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for said western division of the western district of Missouri, and they will ever pray.

H. A. WHITE,
STRONG & MOSMAN,
Attorneys for Petitioner.

STATE OF MISSOURI, } ss:
Buchanan County, }

I, John D. Strong, being duly sworn, do say: That I am one of the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition, and know the contents thereof, and that the statements and allegations therein contained are true as I verily believe.

JOHN D. STRONG.

Subscribed by the said John D. Strong in my presence and by him sworn to before me, this 5th day of April, A. D. 1884. My commission as notary public will expire December 16th, 1884.
9 Witness my hand and notarial seal at office in St. Joseph, Missouri, the day and year first above written.

[SEAL.] JNO. DONOVAN,
Notary Public, Buchanan County, Missouri.

And which said bond is in the words and figures following, to wit:

Know all men by these presents, that we, John C. Phelps, B. H. Throop, Mary T. Phelps, and Isaac J. Past, as principal, and John Donovan and Albe M. Saxton, as sureties, are held and firmly bound unto George R. Oaks in the penal sum of five hundred dollars; the payment whereof, well and truly to be made unto the said George R. Oaks, his heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions, the said principal having petitioned the circuit court of De Kalb county, State of Missouri, for the removal of a certain cause therein depending, wherein John C. Phelps, B. H. Throop, Mary T. Phelps, and Isaac J. Past are plaintiffs and George R. Oaks is defendant, to the circuit court of the United States in and for the western division of the western district of Missouri:

Now, if the said plaintiffs, your petitioners, shall enter into the said circuit court of the United States on the first day of its next session copies of all process and copies of all pleadings, depositions, testimony, and other proceedings in the cause affecting the petitioner, and a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court
10 of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise, of full force and virtue.

Witness our hands and seals, this 5th day of April, A. D. 1884.

JOHN C. PHELPS. [SEAL.]
B. H. THROOP. [SEAL.]
MARY T. PHELPS. [SEAL.]
ISAAC J. PAST. [SEAL.]
JNO. DONOVAN. [SEAL.]
A. M. SAXTON. [SEAL.]

And afterward, to wit, at the said April term of said De Kalb county circuit court, and on the 9th day of April, the following further proceedings were had and entered of record in said cause:

JOHN C. PHELPS, B. H. THROOP, MARY T. PHELPS, and ISAAC J. PAST, Plaintiffs,
against
GEORGE R. OAKS, Defendant.

Now at this time the petition, bond, and affidavit for a removal of this cause to the United States circuit court in and for the western division of the western district of Missouri, heretofore filed in this cause, are taken up and heard by the court; and said bond being found sufficient, is duly approved, and the prayer of the petition granted.

And it is therefore ordered by the court that this cause be removed from the circuit court of De Kalb county, Missouri,
11 to the United States circuit court in and for the western division of the western district of Missouri. And it is further

ordered by the court that the clerk of this court make out and transmit to the clerk of said United States circuit court, at Kansas City, Missouri, a full and complete transcript of the record in this cause, together with all papers not forming a part of the record herein.

STATE OF MISSOURI, }
County of De Kalb, } ss:

I, G. Y. Crenshaw, clerk of the circuit court within and for the State and county aforesaid, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record, together with all papers not forming a part of the record in said cause, as the same appears of record and on file in my office.

Witness my hand as clerk and the seal of said court. Done at office in Maysville, in said county, this 30th day of April, 1884.

[SEAL.] G. Y. CRENSHAW, *Clerk*,
By GEO. H. ROBERTS, *Deputy*.

Afterwards, at said regular May term of said court, and on the 20th day of May, A. D. 1884, the following entry appears of record, to wit:

JOHN C. PHELPS *et al. against* GEORGE R. OAKS.

Upon motion, leave is granted defendant to file answer in fifteen days.

Afterwards, at said regular May term of said court, and on
12 the 16th day of June, A. D. 1884 the following entry appears of record, to wit:

JOHN C. PHELPS *et al. against* GEORGE R. OAKS.

This day comes defendant, by attorneys, and files answer herein; and also comes John and Maria Zeidler, by attorney, and on their application it is ordered that they be made parties defendant herein. Thereupon said John and Maria Zeidler take leave to file motion to remand in 30 days from date.

Said answer is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

JOHN C. PHELPS, B. H. THROOP, MARY T. PHELPS, & ISAAC J. PAST
against
GEORGE R. OAKS.

Comes now the above-named defendant, and for answer to plaintiffs' petition herein denies each and every allegation in said petition contained, except as hereinafter expressly admitted.

And further answering, the defendant says that at the time of the commencement of this action he was in possession of and occupying the premises in the petition described as the tenant from year to year

of one Maria Zeidler, who is the wife of one John Zeidler, and the owner, so defendant is informed, and verily believes, of the said premises, and that defendant has never at any time occupied
13 said premises otherwise than as above stated, and has paid to said Maria Zeidler the full value of the rents of the same up to the first day of March last past.

Wherefore defendant asks that the said Maria Zeidler and John Zeidler be made parties defendant herein according to the form of the statute in such cases made and provided, and to be dismissed with his costs.

RAMEY & BROWN,
Attorneys for Defendant.

Said application of said Maria and John Zeidler to be made parties defendant is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

JOHN C. PHELPS *et al. against* GEORGE R. OAKS.

Come now Maria Zeidler and John Zeidler and state to the court here that they are, and during twenty-five years last past have been, husband and wife. That at and before the bringing of this suit the above-named defendant was in possession of the lands described in plaintiffs' petition as the tenant from year to year of the said Mary Zeidler, and not otherwise. That the said Mary Zeidler is the owner of the lands in controversy, and has a good defense to this suit.

Wherefore said Mary Zeidler and John Zeidler ask to be, by order of the court, made parties defendant in the above-entitled cause, and that they have leave to plead herein at such time as to the court shall seem proper.
14

RAMEY & BROWN,
Attorneys for John & Maria Zeidler.

Stephen S. Brown, being by me first duly sworn, on his oath says: That he is one of the attorneys of the above-named John & Maria Zeidler; that he is as such acquainted with the facts hereinafter stated. That the above-named George R. Oaks was, at the beginning of said suit, in possession of the lands in controversy as the tenant of said Maria Zeidler and not otherwise, and that he verily believes the said John & Maria Zeidler have a good defense to this suit.

STEPHEN S. BROWN.

Subscribed & sworn to before me, this 16th day of June, A. D. 1884.

H. C. GEISBERG, *Clerk.*
By JOHN M. PARRY, *D. C.*

Afterwards, in vacation of said court, and on the 16th day of July, A. D. 1884, the following entry appears of record in said cause, to wit:

JOHN C. PHELPS *et al. against* GEORGE R. OAKS *et al.*

This day come defendants, Maria Zeidler and John Zeidler, by Ramey and Brown, their attorneys, and file motion to remand this cause to the State court.

Said motion to remand is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of Missouri.

15 JOHN C. PHELPS and others
vs.
GEORGE R. OAKS, JOHN ZEIDLER, and MARIA ZEIDLER.

Come now the above-named defendants, Maria Zeidler and John Zeidler, her husband, and move the court here to remand this cause to the circuit court of the State of Missouri within and for the county of De Kalb, and for reason therefor, states that said suit does not really & substantially involve a dispute or controversy properly within the jurisdiction of this court, for that the above-named defendant, George R. Oaks, makes no claim or demand to the premises in controversy otherwise than as the tenant of the defendant Maria Zeidler, all of which fully appears by his answer herein; and the defendants, Maria & John Zeidler, are both citizens of the State of Pennsylvania, of which State all the above-named plaintiffs are also citizens, as appears by their petition for removal herein; that defendant, Maria Zeidler, is the owner of & entitled by her tenant to the possession of the premises described and sued for in the petition, and has a good and complete defense to this action; that defendant, Geo. R. Oaks, was at the beginning of this suit, and for a long time theretofore, in possession of said premises as the tenant of said Maria Zeidler, and not otherwise; that at and before the April term, A. D. 1883, of the said circuit court of the State of Missouri within and for said county of De Kalb an action of ejectment was pending in said circuit court for the lands here in controversy in favor of the plaintiffs herein and against all the above-named defendants in which said
16 action the said Maria & John Zeidler had upon their own motion been made parties defendant, and had filed their answer, and at the said April term said cause being called for hearing in said court, the plaintiffs herein took a voluntary nonsuit and thereupon brought this suit against defendant, Geo. R. Oaks, alone, who was and is a citizen in this State, in order that this suit might be removed to and tried in this court, although there was not then, nor is there now, any real or substantial controversy between plaintiffs and said Geo. R. Oaks, and the real and substantial controversy herein is between the plaintiffs and said John & Maria Zeidler, as hereinbefore stated.

RAMEY & BROWN,
Att'ys for John & Maria Zeidler.

John L. Zeidler, being first duly sworn, upon his oath states: That he is, and for a long time has been, the agent of the above-named

John & Maria Zeidler, in and about the matters involved in the above-named suits, and in and about the defense thereof, and as such has personal knowledged of all the matters stated in the above motion, and that all said matters are true.

JOHN L. ZEIDLER.

Subscribed and sworn to before me, a notary public, within and for the county of Buchanan & State of Missouri, this fourteenth day of July, 1884. My commission expires July 6, 1886.

[SEAL.] JOHN P. STRONG,
Notary Public.

And afterwards, at the regular October term, 1884, of said court, and on the 20th day of October, A. D. 1884, the following entry appears of record, to wit:

17 JOHN C. PHELPS *et al. against* GEORGE R. OAKS *et al.*

This day come plaintiffs, by Messrs. Strong & Mosman, their attorneys, and file motion to set aside the order heretofore made in this cause, making John and Mary Zeidler parties defendant herein.

Said motion is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of Western District of Missouri.

JOHN C. PHELPS *et al.*, Plaintiffs,
against
GEORGE R. OAKS, Defendant.

Now come said plaintiffs, and as to John Zeidler and Mary Zeidler, appearing for the purposes of this motion only, move the court to set aside the order made at the last term of this court, making John Zeidler and Mary Zeidler parties defendant herein, and to order a denial of the application made by them, the said John Zeidler and Mary Zeidler, to be made defendants herein for the following reasons, to wit:

Because said application was made and granted without notice to these plaintiffs.

Because the application fails to show upon its face that said applicants, John Zeidler and Mary Zeidler, were at the time of the institution of this suit, or at any other time, citizens of any State other than that of which the plaintiffs are residents within the purview and meaning of the Constitution and laws of the United States of America.

18 Because said John Zeidler and Mary Zeidler, as a matter of fact, at all times since the institution of this suit, have been, and now are, citizens of the State of Pennsylvania, within the purview and meaning of the Constitution and laws of the United States of America, of which said State said plaintiffs have at all such times been citizens within the purview and meaning of the Constitution and laws of the United States of America.

STRONG & MOSMAN,
H. K. WHITE,
Att'ys for Plaintiffs.

Afterwards, at said term of said court, and on the 23d day of October, A. D. 1884, the following entry appears of record, to wit:

JOHN C. PHELPS *et al. against* GEORGE R. OAKS *et al.*

This day come the parties by their attorneys, the plaintiffs, by Messrs. White, Strong & Mosman, and the defendants, by Messrs. Ramey & Brown, and the motion to set aside the order herein, making John & Mary Zeidler parties defendant hereto, being called for hearing, the same is fully heard, argued by counsel, and submitted to the court, and taken under advisement.

And afterwards, at said regular October term of said court, and on the 24th day of October, A. D. 1884, the following entry appears of record, to wit:

JOHN C. PHELPS *et al. against* GEORGE R. OAKS *et al.*

The motion of defendants to remand this cause, and the
19 motion to plaintiffs to rescind the order making John and Mary Zeidler parties defendant, having been submitted and taken under advisement; Now, the premises being fully understood, the court doth order that said motion to rescind be denied, and that said motion to remand be granted.

It is therefore ordered that this cause be remanded to the State court, and that the clerk certify this order on the payment of costs.

Afterwards, at said regular October term of said court, and on the 8th day of November, A. D. 1884, the following entry appears of record, to wit:

JOHN C. PHELPS *et al. against* GEORGE R. OAKS *et al.*

This day come the plaintiffs and present bill of exceptions; whereupon the same is signed by the judge and ordered filed, and made a part of the record herein, which is accordingly done.

Said bill of exceptions is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western District of Missouri.

JOHN C. PHELPS *et al.*, Plaintiffs,

against

GEORGE R. OAKS, JOHN ZEIDLER, & MARIA ZEIDLER, Defendants.

Be it remembered that on the —— day of ——, 1884, defend-
20 ants, John Zeidler and Mary Zeidler, who had been made parties defendant in this cause after its removal to this court from the circuit court of De Kalb county, State of Missouri, filed in this court their motion to remand this cause to the circuit court of De Kalb county, Missouri, which said motion is in words and figures following, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

JOHN C. PHELPS *et al.*, Plaintiffs,
vs.
GEORGE R. OAKS, JOHN ZEIDLER, & MARIA ZEIDLER, Defendants.

Come now the above-named defendants, Maria Zeidler and John Zeidler, her husband, and move the court here to remand this cause to the circuit court of the State of Missouri within and for the county of De Kalb, and for reason therefor state:

That said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, for that the above-named defendant, George R. Oaks, makes no claim or demand to the premises in controversy otherwise than as the tenant of the defendant, Maria Zeidler, all of which fully appears by his answer herein; and the defendants, Maria Zeidler and John Zeidler, are both citizens of the State of Pennsylvania, of which State all the above-named plaintiffs are also citizens, as appears by their petition for removal herein.

That defendant, Maria Zeidler, is the owner of and entitled by her tenant to the possession of the premises described and sued for in the petition, and has a good and complete defence to this action.

21 That defendant Oaks was at the beginning of this suit, and for a long time theretofore, in possession of the said premises as the tenant of the said Maria Zeidler, and not otherwise.

That at and before the April term, A. D. 1883, of the said circuit court of the State of Missouri in and for said county of De Kalb, an action of ejectment was pending in said circuit court for the lands here in controversy, in favor of plaintiffs herein, and against all the above-named defendants, in which said action the said Maria and John Zeidler had, upon their own motion, been made defendants, and had filed their answer; and at the said April term, said cause being called for hearing in said court, the plaintiffs therein took a voluntary nonsuit, and thereupon brought this suit against defendant Oaks alone, who was and is a citizen of this State, in order that this suit might be removed to and tried in this court, although there was not then, nor is there now, any real or substantial controversy between plaintiffs and said Oaks, and the real and substantial controversy herein is between the plaintiffs and said John and Maria Zeidler, as hereinbefore stated.

RAMEY & BROWN,
Att'ys for John & Mary Zeidler.

John L. Zeidler, being first duly sworn, on his oath states: That he is, and for a long time has been, the agent of the above-named John & Mary Zeidler, in and about the matters involved in the aforesaid suit, and in and about the defense thereof, and as such has personal knowledge of all the matters stated in the above motion, and that all said matters are true.

J. L. ZEIDLER.

Subscribed and sworn to before me, this —— day of ——, 1884.
[SEAL.] JOHN P. STRONG,
Notary Public.

22 That afterwards said motion, at the October term, 1884, of said court, came on for hearing, and was by the court sustained, and an order made remanding the said cause to the circuit court of De Kalb county of the State of Missouri, by which action of the court in sustaining said motion, and in remanding said cause to said circuit court of the State of Missouri for the county of De Kalb, said plaintiffs at the time excepted, and still except.

And now, at the said October term, 1884, of said court, said plaintiffs present this their bill of exceptions, and ask to have the same signed by the judge of said court hearing said motion, the Honorable David J. Brewer, judge of the United States circuit court for the district aforesaid, sealed with his seal and made a part of the record herein, which is accordingly done.

DAVID J. BREWER,
Circuit Judge.

Afterward, to wit, on the 23d day of November, A. D. 1884, there was filed and entered upon the record the following order of the Honorable Arnold Krekel, judge:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri. In Vacation.

Before the Honorable Arnold Krekel, judge, at chambers.

JOHN C. PHELPS *et al. against* GEORGE R. OAKS *et al.*

This day come the plaintiffs, by their attorneys, White, Strong & Mosman, and present a bond, a writ of error to reverse the judgment of this court in the above-entitled cause, and a citation
23 to the defendants herein. Thereupon said bond is approved by the judge, and ordered to be filed and made a part of the record herein; said writ of error is allowed, and said citation is signed.

Said bond is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *set:*

Know all men by these presents, that we, John C. Phelps, B. H. Throop, and Mary T. Phelps are held and firmly bound unto George R. Oaks, Maria Zeidler, and John Zeidler, her husband, executors and administrators, in the sum of five hundred dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this — day of Nov., A. D. 1884.

Upon this express condition, to wit: Whereas the above-named John C. Phelps, B. H. Throop, and Mary T. Phelps have prosecuted a writ of error to the Supreme Court of the United States to reverse

the judgment rendered in the cause above named by the circuit court of the United States for the western division of the western district of Missouri: Now, if the above-named John C. Phelps, B. H. Throop, and Mary T. Phelps shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation to be void; otherwise, to remain in full force and virtue.

B. H. THROOP,
JOHN C. PHELPS, &
MARY T. PHELPS,
By H. K. WHITE, *Att'y.*
JNO. DONOVAN. [SEAL.]
A. M. SAXTON. [SEAL.]

24 Signed and sealed in presence of—
H. K. WHITE.

The above bond is hereby approved, and ordered to be filed and made a part of the record.

A. KREKEL, *Judge.*

UNITED STATES OF AMERICA, }
Western District of Missouri, } *ss:*

John Donovan, obligor in the within bond, being duly sworn, on his oath deposes and says: That he resides as stated therein, and is worth, over and above all his debts and liabilities, the sum of five hundred dollars, and that he owns property to that amount subject to execution in the State of Missouri.

JNO. DONOVAN.

Subscribed and sworn to before me, this nineteenth day of November, A. D. 1884.

JOHN M. STEWART,
Com'r U. S. Cir. Court, Western Dist. of Mo.

UNITED STATES OF AMERICA, }
Western District of Missouri, } *ss:*

A. M. Saxton, obligor in the within bond, being duly sworn, on his oath deposes and says: That he resides as stated therein, and is worth, over and above all his debts and liabilities, the sum of five hundred dollars, and that he owns property to that amount subject to execution in the State of Missouri.

A. M. SAXTON.

Subscribed and sworn to before me, this nineteenth day of November, A. D. 1884.

JOHN M. STEWART,
Com'r U. S. Cir. Court, Western Dist. of Mo.

25 UNITED STATES OF AMERICA, *sct:*

I, Henry C. Geisberg, clerk of the circuit court of the United States for the western division of the western district of Missouri,

do hereby certify that the foregoing is a true and complete transcript of the record and proceedings in the cause therein named, as fully as the same appear on file and of record in my office.

Witness my hand as clerk, and the seal of said court. Done at office in Kansas City, Missouri, this 26th day of November, A. D. 1884.

[SEAL.] H. C. GEISBERG, *Clerk*,
By WARREN WATSON, *D. C.*

26 In the Supreme Court of the United States. October Term, A. D. 1884.

JOHN C. PHELPS, B. H. THROOP, and MARY T. PHELPS,
Plaintiffs in Error,
vs.
GEORGE R. OAKS, JOHN ZEIDLER, and MARIA ZEIDLER,
Defendants in Error.

Error to the circuit court of the United States for the western division of the western district of Missouri.

Now come the said John C. Phelps, B. H. Throop, and Mary T. Phelps, plaintiffs in error, by Sanford B. Ladd, their attorney, and say that in the record and proceedings in this cause there is manifest error in this, to wit, that said court made an order remanding said cause to the circuit court within and for the county of De Kalb, in the State of Missouri, whereas, by the law of the land, said court ought to have made an order refusing to remand said cause, and ought to have retained jurisdiction of the same for trial thereof; and the said John C. Phelps, B. H. Throop, and Mary T. *Throop* pray that the order aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said order, &c.

SANFORD B. LADD,
Attorney for Plaintiffs in Error.

27 [Endorsed:] John C. Phelps *et al.*, pl'ffs in error, *vs.* Geo. R. Oaks *et al.*, def'ts in error. Assignment of error.

Endorsed on cover: W. Missouri C. C. U. S. No. 1239. John C. Phelps, B. H. Throop, & Mary T. Phelps, plaintiffs in error, *vs.* George R. Oaks, Maria Zeidler, & John Zeidler (her husband). Filed 6th December, 1884.

117-236

117-236

Office Supreme Court U. S.
FILED.
JAN 26 1886
JAMES H. McKENNEY.
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

No 1239.

JOHN C. PHELPS,
B. H. THROOP, AND
MARY T. PHELPS,
Plaintiffs in Error.

vs.

GEORGE R. OAKS,
MARIA ZEIDLER, AND
JOHN ZEIDLER, HER HUSBAND.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

ARGUMENT FOR PLAINTIFFS IN ERROR.

S. B. LADD,
Counsel.

J. D. STRONG,
C. A. MOSMAN,
H. K. WHITE,
Associate Attorneys.

C. P. Kingsbury, Steam Printer, St. Joseph, Mo.

In the Supreme Court of the United States.

JOHN C. PHELPS, ET ALS, *Plaintiffs in Error*,

AGAINST

GEORGE R. OAKS, ET ALS, *Defendants in Error.*

STATEMENT OF CASE.

The transcript shows that on the fourth day of April, 1883, plaintiffs in error commenced suit in ejectment against defendant Oaks, to recover possession of a tract of land in DeKalb County, State of Missouri, and five thousand dollars damages for the detention thereof, and fifty dollars for monthly rents and profits.

Transcript page 3.

The usual summons issued, returnable to October term, 1883, of said Circuit Court, and was served April 9th, 1883.

Transcript page 4.

No appearance was made at the October or return term. At the April or trial term, 1884, plaintiffs removed the cause to the Circuit Court of the United States for the Western District of Missouri. The petition and bond were in due form.

Transcript pages 5 and 6.

The transcript was filed in said United States Circuit Court, May 19th, 1884, which was in due time.

Transcript page 2.

At the May term, 1884, of said United States Circuit Court, defendant Oaks appeared and filed answer. On the same day and without notice to plaintiffs, John and Maria Zeidler appeared and on their application were made defendants. Their application to be made parties, averred that Maria Zeidler was landlord of defendant Oaks, but did not disclose their citizenship.

Transcript page 8.

Defendant Oaks, in his answer, averred that he was tenant from year to year of Maria Zeidler.

Transcript pages 7 and 8.

On the 16th of June, 1884, defendant Maria Zeidler filed motion to remand the cause to the Circuit Court of DeKalb County, Missouri. In her motion she alleges there is no substantial controversy between plaintiffs and defendant Oaks; that she and her husband are citizens of Pennsylvania, the same state of which plaintiffs were citizens, as shown by their petition for removal of the cause; that she has a complete defense to the action. She further alleged that there had been previously pending in the Circuit Court of DeKalb County, Missouri, an action in ejectment between plaintiffs and defendant Oaks, to which she and her husband had been made parties on their own application, and that plaintiffs had suffered a voluntary non-suit, and that they had done so in order to recommence proceedings against Oaks, for the purpose of removing the cause to the United States Court, although the real and substantial controversy was between plaintiff and defendant Maria Zeidler.

This motion was signed by the same attorneys that appeared for defendant Oaks.

Transcript pages 9 and 10.

This motion was argued, and after advisement was, on the 24th day of October, 1884, sustained and order made remanding the case to the State Court.

Transcript page 11.

To this action of the court the plaintiffs excepted, filed their bill of exceptions November 8th, 1884, and bring the case to this court for review of this order. Writ of error issued November 20th, 1884.

Transcript page 13.

SPECIFICATIONS OF ERROR.

The plaintiffs in error urge as specific grounds for reversing the order made in this case;

First. That the issue should have presented by plea in the nature of a plea in abatement, and not by motion.

Second. That the motion, if proper in practice, was insufficient in that it did not allege that John and Maria Zeidler were citizens of Pennsylvania at the time of the institution of the suit.

Third. That the court erred in holding that the landlord of a tenant sued in ejectment, was so far a necessary party to the suit that he could be made a party on his own application, even though the effect was to oust the court of a jurisdiction already attached.

Fourth. That the court erred in holding that an ejectment against a tenant did not present a real and substantial controversy within the jurisdiction of the United States Court, when the landlord of the tenant and the plaintiffs were citizens of the same state.

POINTS AND AUTHORITIES.

I.

The issue should have been presented by plea, in the nature of a plea in abatement, and not by motion.

Dillon on Removal of Causes, 105.
Coal Co. vs Blatchford, 11 Wall., 173.
Hoyt vs. Wright, 1 McCrary, 130.
Heath vs. Austin, 12 Blatch. C. C., 320.

II.

The motion was insufficient upon its face. It did not aver that at the institution of the suit or at the time of being made, parties defendant, the Zeidlers, were citizens of Pennsylvania.

Insurance Co vs. Pechner, 95 U. S., 183.
Amory vs. Amory, 95 U. S., 186.

III.

Setting aside all formal questions, the plaintiffs in error urge that the court below erred in holding that the landlord had a right to demand that he be made a party, and that it was the duty of the court to admit him as defendant, even though such admission had the effect of ousting the court of the jurisdiction, which attached when plaintiffs removed the case to the United States Circuit Court:

First. At common law, the landlord could ordinarily be made a party on his own application, but he was not a necessary party, and it was error to discharge the tenant, without the consent of the plaintiff.

Sedgwick and Waite, on Trial of Title, Sec. 264.
Emlen vs. Hoops, 3 S. & R., (Penn.,) 130.
Cited in Beardsley vs. Torrey 4 Wash., C. C., 286.
Fosgate vs. Herkimer Co., 12 N. Y., 580.
Sutton vs. Casselliggi, 77 Mo., 397.
Richardson vs. Harvey, 37 Geo., 224.

The tenant can make every defence that his landlord can make and show outstanding title to defeat plaintiff's right of recovery; and as tenant and alleged landlord were in this case, represented by the same attorneys, no possible conflict of interest could arise, nor could an appeal be made to the discretion of the court, if it were a case in which it were proper to exercise discretion, on the ground that the tenant was not properly defending, and that injury might accrue to the landlord by reason of the tenant's unfaithfulness.

Second. The statutes of Missouri on this point do not change the common law. So far as known to plaintiffs in error, the following sections only of the statute of Missouri were considered applicable to the point at issue.

Ejectment Act, R. S., 1879, Vol. 1, p. 374.

Sec. 2243. The action shall be be prosecuted in the real names of the parties thereto, and shall be brought against the person in possession of the premises claimed.

opinion of the court as to the questions of title arising might be pecuniarily more substantial to the landlord than to the tenant, that did not make it a case in which there was not really and substantially a dispute or controversy properly within the jurisdiction of the United States Court. Defendant Oaks was not a nominal party. Whether sued with or without his landlord as a codefendant, judgment for substantial damages could be rendered against him. He was the only necessary defendant against whom the writ of possession could issue in order that plaintiffs might be placed in possession.

Sutton vs. Casselleggi, 77 Mo., 397.

The general principle that jurisdiction once attaching will not be ousted by a change of parties, has been repeatedly recognized in this court.

Clarke vs. Mathewson, 12 Peters, 164.

Duner vs. Clarke, 8 Peters, 1.

Morgan's Heirs vs. Morgan, 2 Wheat., 296.

The reasoning in these cases was applied recently in the Minnesota Circuit Court, to a case where a complainant in a bill transferred his interest to a resident of the same state as the defendant, and the court held that its jurisdiction was not ousted.

Glover vs. Shepperd, 18 The Reporter, 578.

And in a case in the Massachusetts Circuit Court where a case had been brought by an alien against citizens of New York, a citizen of New York was admitted as a party plaintiff to protect his interests. The defendants claimed that the case should be dismissed. It was held that the admission of the New York plaintiff, by leave of court, did not in a jurisdictional sense make him plaintiff, and that he acquired thereby no control over the suit, and that even if the court had erred in admitting him as plaintiff, it should not prejudice the plaintiff's case, as it was not done at his instance.

Graham vs. Boston &c., R. R., 17 Fed. Rep., 753.

As said by Coxe J., in the New York Circuit Court: "The state and Federal tribunals are entirely independent of each other, and it will not be possible to produce an authority holding that the United States Circuit Courts should close their doors to suitors, because the questions they seek to litigate are also involved in other actions between different parties in the courts of the state.

Currie vs. Lewiston, 15 Fed. Rep., 377.

No person other than defendant was charged with the unlawful detention of the property. The plaintiff's controversy is with defendant Oaks, and this controversy was fully determinable in the United States Court. The defendant coming in sought to assume a common responsibility with Oaks, if there was any liability resting upon him, but this cannot impair plaintiffs' right to seek their remedy in the court of their choice. To permit another, not sought to be made liable and against whom no complaint is made, to assume an unnecesssry responsibility, and thereby withdraw the only controversy which plaintiffs have sought from a rightfully attaching jurisdiction, is a perversion of the law.

Gudger vs. Railway Co., 87 N. C., 325.

Vide Stewart et. al. vs. Bunham et. al. Oct. term 1885 5 Sup. Ct. Rep. 1163.

(Decided since preparation of this brief.)

V.

It is not deemed necessary to notice the allegations of the motion relating to the prior suit, further than to say that if the order complained of in this case is correct. A similar order must have been made on similar application if the first suit had been originally commenced in the United States Court by plaintiffs against defendant Oaks alone, for the provisions of section five of the act of March 3, 1875, relating to divesting the United States Courts of their jurisdiction of cases not involving real and substantial controversies between citizens of different states, apply as well to suits commenced in the United States Courts as to those commenced in State Courts and removed to the United States Courts.

For these reasons plaintiffs in error ask that the order complained of be reversed, and that the Circuit Court of the United States for the Western District of Missouri, be ordered to take jurisdiction of the case.

S. B. LADD,
Counsel for Plaintiffs in Error.

J. D. STRONG,
C. A. MOSMAN,
H. K. WHITE,
Associate Counsel.

Office Supreme Court U. S.
FILED
FEB 8 1886
JAMES H. McKENNEY,
CLERK.

117-236

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1885

No. ~~1239.~~ 807.

JOHN C. PHELPS, B. H. THROOP, AND MARY T. PHELPS,
PLAINTIFFS IN ERROR,

against

GEORGE R. OAKS, MARIA ZEIDLER, AND JOHN ZEIDLER
HER HUSBAND, DEFENDANTS IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

ARGUMENT OF DEFENDANTS IN ERROR.

IN THE

SUPREME COURT OF THE UNITED STATES,

JOHN C. PHELPS, *et als.*, PLAINTIFFS IN ERROR,

against

GEORGE R. OAKS, *et als.*, DEFENDANTS IN ERROR.

ARGUMENT OF DEFENDANTS IN ERROR.

The grounds urged by plaintiffs in error for reversing the order of the circuit court remanding this cause to the state court, are as follows :

First.—That the issue should have been presented by plea in the nature of a plea in abatement, and not by motion to remand.

Second.—That the motion, if proper in practice, was insufficient, in that it did not allege that John and Maria Zeidler were citizens of Pennsylvania at the time of the institution of the suit.

Third—That the court erred in holding that the landlord of a tenant sued in ejectment was so far a necessary party to the suit, that he could be made a party on his own application, even though the effect was to oust the court of a jurisdiction already attached.

Fourth.—That the court erred in holding that an ejectment against a tenant did not present a real and substantial controversy within the jurisdiction of the United States court, when the landlord of the tenant and the plaintiffs were citizens of the same state.

These specifications of error we will consider in numerical order as stated above.

I.

In view of the uniform practice of the courts of the United States since the act of September 24, 1879, the claim that the issue of citizenship in this case should have been presented by plea in the nature of a plea in abatement hardly calls for argument. Even in cases originally brought in the circuit courts of the United States, "a plea in abatement is required only where the citizenship *averred* is such as to support the jurisdiction of the court, and the defendant desires to controvert the averment. The question of citizenship constitutes no part of the issue upon the merits."

Coal Co. vs. Blatchford, 11 Wall, 172.

In this case it is expressly admitted by plaintiffs in the record that defendants Zeidler are citizens of the same state with plaintiffs.

Printed Record, p. 10.

In such cases it may be taken advantage of "on motion, at any stage of the proceedings."

Coal Co. vs. Blatchford, *supra*.

II.

The fact that the motion to remand does not expressly state that the defendants Zeidler were citizens of the same state with plaintiffs at the time of the institution of the suit in the state court, becomes unimportant in view of the fact that this had been already admitted by plaintiffs upon the record. Their motion to set aside the order admitting the Zeidlers as parties defendant assigns the following among the reasons therefor:

"Because the application fails to show upon its face that the said applicants, John Zeidler and Mary Zeidler, were, at the time of the institution of this suit, or at any other time, citizens of any state other than that of which the plaintiffs are residents, within the purview and meaning of the constitution and laws of the United States of America.

Because said John Zeidler and Mary Zeidler, *as a matter of fact*, at all times since the institution of this suit have been, and now are, citizens of the state of Pennsylvania within the purview and meaning of the constitution and laws of the United States of America, of which said state said plaintiffs have at all such times been citizens within the purview and meaning of the constitution and laws of the United States of America."

If these facts were fatal to the jurisdiction of the circuit court their admission upon the record made it the duty of that court,

under the provisions of the fifth section of the act of March 3, 1875. (18 U. S. Stat. at L., 470) to remand the case.

III.

It now becomes necessary to inquire, whether or not, the Zeidlers were properly made parties defendant by the circuit court. It will not be denied that it was the duty of that court to enforce the laws of the state of Missouri, and if those laws gave the landlord the absolute right to become a party to and defend the ejectment against his tenant, then it would have been error to have refused to admit them.

The statutes of Missouri provides that "every tenant on whom a summons in an action to recover the tenements held by him shall be served, shall forthwith give notice thereof to the person or agent of the person of whom such tenant holds, under the penalty of forfeiting to such person the value of three years rent of the premises occupied by him."

(R. S. Mo., 1879, Vol. 1, p. 514, Sec. 3071.)

It is evident, without argument, that the legislature of the state intended, by the imposition of this heavy penalty, to secure to the landlord some substantial right. What this right was, sufficiently appears from the following provision :

Sec. 2244. The person *from* or through whom the defendant claims title to the premises may, on motion, be made a co-defendant. (I. R. S. Mo., p. 374.)

It is held by the supreme court of the state that this statute gives the landlord the right to come in and defend.

Sutton vs. Casseleggi, 77 Mo., 397-408.

And that the plaintiff has no right to dismiss as to the landlord and take judgment against the tenant.

Hayden vs. Stewart, 27 Mo., 286.

Even at common law the landlord had the right to be made a party defendant on his own application.

Fosgate vs. Herkimer Co , 12 N. Y., 580.

Sutton vs. Casseleggi, 77 Mo., 397.

That this is the law is admitted by the plaintiffs in error at page 3 of their brief.

In this case the tenant by his answer disclaimed that he held in any other way than as the tenant of Maria Zeidler, whom he believed to be the owner of the land, and asked that she and her be required to come in and defend. This was equivalent to an asser-

tion that he had no controversy with the plaintiffs. The possession of the tenant was the possession of the landlord, and the landlord, having been admitted to defend, as he had a right to be, was defending his own possession so as to prevent his tenant from permitting it to pass over to a stranger.

Hayden vs. Stewart, 27 Mo., 286.

Had the defendant admitted in his answer that the title and right to the possession were in the plaintiffs, the real controversy between the plaintiffs and the Zeidlers would still have remained.

That in a suit for the possession of lands against the landlord and his tenant the real and substantial controversy is between the plaintiff and the landlord has already been decided by this court in Corbin vs. Vanbrunt, 105 U. S., 576. It is said by the Chief Justice in that case that the controversy between the tenants and the plaintiff "is a mere adjunct of the principal dispute."

If it should be held, as contended by plaintiff in error, that the landlord, who happens, as in this case, to be a citizen of the same state as his adverse claimant, could not come into the United States court to defend his possession, then the tenant upon whom a summons in ejectment from that court should be served, might "forthwith give notice thereof" to his landlord, and then quietly sit down and permit the court to turn over his possession to the plaintiff, and escape the just penalty the statute of the state for such perfidy. The doctrine that the Federal courts are powerless to prevent themselves from becoming the instruments of such fraud hardly deserves consideration.

IV.

If the Zeidlers were properly admitted as defendants in this case, it remains to be considered whether the circuit court thereby lost its jurisdiction. This depends upon the construction to be given to the act of March 3, 1875. (Chapter 137.)

If the circuit court at any time had jurisdiction of this cause it was by virtue of one of the two clauses of the second section of the act above mentioned. Those clauses, so far as applicable to the matter under discussion, are as follows:

First.—That any suit of a civil at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * * * in which there shall be a controversy between citizens of different states, * * * * either party may remove the said suit into the circuit court of the United States for the proper district.

Second.—And when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

It will hardly be claimed that the jurisdiction of the circuit court in this case was either acquired or could be held under the second clause above quoted. In no sense is there a *separable* controversy between the plaintiff and the defendant. The theory upon which the landlord is admitted is that he has the right to defend the possession held by the tenant and this can only be done in the suit against the tenant. It is the very right to be an *inseparable* party to the suit which is secured to him by law. If the jurisdiction can be sustained it must be under the first clause above quoted, which is the one under which it was originally acquired.

Under the law as it stood before 1875 "the pleadings only were looked at, and the rights of the parties in respect to a removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit."

"Removal Cases," 10 Otto, 457.

Coal Co. vs. Blatchford, 11 Wall. 174.

Under the clause in question of the act of 1875 the form of the pleadings is disregarded, and the parties are arranged on either side of the real matter in controversy, and the circuit court can only obtain jurisdiction when all the parties so arranged on one side are citizens of different states from those on the other side.

"Removal Cases," *supra*.

Barney vs. Latham, 13 Otto, 205.

It would seem that this act, as interpreted by the adjudications above cited, requires that to authorize a removal the record should show that the suit "really and substantially involves a dispute or controversy properly within the jurisdiction of the circuit court," aside from the fact that the parties are respectively plaintiff and defendant upon the record; for the "Removal Cases," *supra*, distinctly recognize the fact, which was true in those cases, that there may be no real controversy between a plaintiff and defendant, and that the real dispute, if there be any, may be between co-defendants and co-plaintiffs. If this be true, then the case at bar was improperly removed in the first instance, because no answer had been filed, and it did not appear upon the record that the defend-

ant disputed or controverted plaintiff's claim. Nothing which subsequently occurred in the circuit court could help its jurisdiction, because those occurrences served to demonstrate that all the parties on one side were not citizens of different states from those on the other. They demonstrated, in fact, that the real and substantial dispute was between citizens of the same state.

But admitting, for the purposes of this argument, that this suit was properly removed before answer filed, and that the circuit court thereby acquired jurisdiction, the defendant tenant might at any time file his answer admitting the plaintiffs' right to the possession of the premises, and the alleged damages, thus entitling the plaintiff to an amicable judgment upon the pleadings. If the premises be true there is no doubt of the jurisdiction of the circuit court to render such a judgment. But if, when such an answer is filed, the landlord objects to his possession being quietly turned over to a stranger, and comes in and defends, we have the spectacle of a controversy being carried on in the circuit court, solely between citizens of the same state. Yet this could unquestionably be done if the plaintiffs' position, that the jurisdiction once lawfully acquired, cannot be ousted by the addition of a new party, is correct. Let us inquire if the act of March 3, 1875, made any provision for a state of things so palpably in violation of its spirit.

The law as it stood before the passage of that act made no provision for remanding cases that had been improperly removed to the circuit courts, yet such was the constant practice of those courts, and it needed no statute to affirm or sustain it; and suits improperly brought in those courts were dismissed without the sanction of any express statute.

Coal Co. vs. Blatchford, *supra.*

Yet the congress thought it necessary to introduce into the act of March 3, 1875, the provisions of section 5, which, so far as they are applicable to this case, are as follows:

That if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, *at any time after such suit has been brought or removed thereto*, that such suit does not really and substantially involve a controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but dismiss the suit, or remand it to the court from which it was removed, as justice may require.

Applying the definition given in the "Removal Cases," *supra*, we find that the words "a dispute or controversy properly within the jurisdiction of said circuit court," mean, so far as they are applicable to this case, a dispute or controversy in which all the parties on one side are citizens of different states from those on the other side. The obvious meaning of the language quoted is that if, in consequence of any proceeding subsequent to the removal, it appears that this is not the case, the cause should be remanded. Any other interpretation, in cases like the one at bar, would enable the claimant to take advantage of the citizenship of a disinterested and willing tenant, to litigate the right of the landlord in a court having no jurisdiction of the real contestants.

In such a case it could not be claimed that the parties were improperly or collusively *joined* for the purpose of giving the circuit court jurisdiction, because the suit would be brought against the only party against whom the law authorized it to be brought in the first instance.

In *Barney* vs. *Latham*, 13 Otto., 205, it was held by this court that the circuit court of the United States had acquired jurisdiction of the case by removal from the state court on account of the citizenship of the parties, but it was also held that if the pleadings should be subsequently so changed as to show that the cause did not really and substantially involve a controversy within the jurisdiction of the circuit court, it could be remanded. We see no difference in principle between that case and this.

The case of *Stewart* vs. *Dunham*, 5 Sup. Ct. Rep. 1163, cited by plaintiff as holding that the jurisdiction of the United States court, once lawfully acquired, could not be divested by the addition of new parties, is really an authority in favor of the position contended for by us. This court there holds that the jurisdiction of the court was not ousted by the addition of the new parties plaintiffs, because "the right of the court to proceed to a decree between the appel-"lants and the new parties did not depend upon difference of citi-"zenship; because, the bill having been filed by the original com-"plainants on behalf of themselves and all other creditors choosing "to come in and share the expenses of the litigation, the court in "exercising jurisdiction between the parties, could incidentally "decree in favor of all other creditors coming in under the bill. "Such a proceeding would be auxiliary to the jurisdiction acquired "between the original parties, and it would be merely matter of "form whether the new parties should come in as co-plaintiffs, "or before a master, under a decree ordering a reference to prove